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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MEDIA COMMUNICATIONS, INC.,
INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION,
NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS,
PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC.,
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
and VIDEO SOFTWARE DEALERS ASSOCIATION,
Petitioners,

v.

WILLIAM S. COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 343 of the National Defense Authorization Act for Fiscal Year 1997, codified at § 10 U.S.C. § 2489a (the "Act"), bans the sale or rental on Department of Defense property, including through the military exchange system, of some forms of expressive material, but not of other forms, if "the dominant theme of [the material] depicts or describes nudity . . . in a lascivious way." The constitutional questions presented are:

1. Whether military exchanges, which since their inception have been used for the dissemination of constitutionally protected expressive materials based on neutral criteria such as customer demand, are designated public fora, in which the government cannot ban the dissemination of protected speech on the basis of content absent a compelling interest achieved through narrowly tailored means.

2. Whether banning the sale or rental of depictions or descriptions of nudity presented in a lascivious way, but not in ways that are chaste or tasteful, constitutes impermissible discrimination against the viewpoints attributed to and expressed by the producers and distributors of the banned material.

3. Whether the Act irrationally and unreasonably bans some forms of speech but not others, utilizing impermissibly vague terms, in violation of the First and Fifth Amendments.

RULE 14.1(b) AND RULE 29.6 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the court of appeals whose judgment is sought to be reviewed is as follows:

General Media Communications, Inc.
International Periodical Distributors Association
National Association of Recording Merchandisers
Periodical and Book Association of America, Inc.
Recording Industry Association of America, Inc.
Video Software Dealers Association
William J. Perry, in his official capacity
William S. Cohen, in his official capacity
Department of Defense

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

None of the named petitioners has any corporate parent, subsidiary or affiliate which is publicly held. (For this purpose, members of trade associations have not been considered affiliates of such trade associations).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) AND RULE 29.6 STATEMENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE PETITION	12
I. THE TEST APPLIED BY THE COURT OF APPEALS FOR DETERMINING WHETHER GOVERNMENT PROPERTY IS A DESIGNATED PUBLIC FORUM CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH THE TEST APPLIED IN OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED	12
II. THE TEST APPLIED BY THE COURT OF APPEALS FOR DETERMINING WHETHER A REGULATION OF SPEECH IS VIEWPOINT-BASED CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH THE TEST APPLIED IN OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED	19
III. THE COURT OF APPEALS' ANALYSIS IN CONCLUDING THAT THE ACT IS REASONABLE IN LIGHT OF THE PURPOSE OF EXCHANGES CONFLICTS WITH THE ANALYSIS EMPLOYED BY OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED	28
CONCLUSION	30

TABLE OF CONTENTS—Continued

APPENDICES		Page
Appendix A:	OPINION, U.S. Court of Appeals for the Second Circuit, November 21, 1997	1a
Appendix B:	Amended OPINION and ORDER, U.S. District Court for the Southern District of New York, February 20, 1997	45a
Appendix C:	ORDER, denying petition for rehearing, U.S. Court of Appeals for the Second Circuit, February 3, 1998	68a
Appendix D:	ORDER, Granting a Stay of Mandate Pending Petition for Certiorari, U.S. Court of Appeals for the Second Circuit, February 13, 1998	70a
Appendix E:	Section 343 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. No. 104-201), 10 U.S.C. § 2489a	72a
Appendix F:	DoD Directive-Type Memorandum —Sale or Rental of Sexually Explicit Material on DoD Property (eff. Dec. 22, 1996)	74a

TABLE OF AUTHORITIES

CASES

Page

AIDS Action Committee v. Massachusetts Bay Transportation Authority, 42 F.3d 1 (1st Cir. 1994) 27
Air Line Pilots Association International v. Department of Aviation of the City of Chicago, 45 F.3d 1144 (7th Cir. 1995) 15
American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) 21
American Council of the Blind v. Boorstin, 644 F. Supp. 811 (D.D.C. 1986) 21
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 23, 24
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 21
Board of Education v. Pico, 457 U.S. 853 (1982) 21
Brown v. Glines, 444 U.S. 348 (1980) 13
Brown v. Palmer, 944 F.2d 732 (10th Cir. 1991 16
Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) 27
Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), *cert. denied*, 117 S. Ct. 360 (1996) 28
City of Madison Joint Sch. District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 14, 16, 17
Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788 (1985) 14, 19, 28, 29
Finley v. National Endowment for the Arts, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997) 26
Flower v. United States, 407 U.S. 197 (1972) 15, 16
Forbes v. Arkansas Education Television Commission, 93 F.3d 497 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997) 14, 15
Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997) 26, 27
Greer v. Spock, 424 U.S. 828 (1976) 13, 15
Grosjean v. American Press Co., 297 U.S. 233 (1936) 23

TABLE OF AUTHORITIES—Continued

	Page
Grossbaum v. Indianapolis-Marion County Building Authority, 63 F.3d 581 (7th Cir. 1995)	28
International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1972)	18
Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 (1959)	22
Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992)	16
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)	24, 25, 27
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	18
Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983)	23
Multimedia Pub. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993)	30
Parker v. Levy, 417 U.S. 733 (1974)	13
Perry Education Association v. Perry Local Education Ass'n, 460 U.S. 37 (1983)	14, 18, 19
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)	22
Rigdon v. Perry, 962 F. Supp. 150 (D.D.C. 1997)	15, 16
Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995)	24, 25, 26, 27
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)	29
Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989)	29
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	14
Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997)	28
Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (1985)	15
Texas v. Johnson, 491 U.S. 397 (1989)	21, 22, 24
Travis v. Owego-Apalachin Sch. District, 927 F.2d 688 (2d Cir. 1991)	16
Tucker v. State of Cal. Dept. of Educ., 97 F.3d 1204 (9th Cir. 1996)	29, 30

TABLE OF AUTHORITIES—Continued

	Page
United States v. Albertini, 472 U.S. 675 (1985)	15
United States v. Kokinda, 497 U.S. 720 (1990)	18
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)	21
Widmar v. Vincent, 454 U.S. 263 (1981)	16, 17
FEDERAL LEGISLATIVE MATERIALS	
10 U.S.C. § 2489a	*passim*
10 U.S.C. § 2489a(a)	7
10 U.S.C. § 2489a(b)	7
10 U.S.C. § 2489a(d)(1)	7, 19, 22, 26
10 U.S.C. § 2489a(d)(2)	7
20 U.S.C. § 954(d)(1)	26
28 U.S.C. § 1254(1)	1
142 Cong. Rec. H8822 (July 30, 1996)	6, 20
Roscoe Bartlett Press Release, May 1, 1996	6
Roscoe Bartlett Press Release, Sept. 18, 1996	6
STATE STATUTES	
Ala. Code § 16-1-28	26
MISCELLANEOUS	
Robert Cohen, *New Military Enemy: Hustler and Playboy Amendment Can Ban Sales on U.S. Bases*, Star-Ledger, May 2, 1996	6
Guy Gugliotta & Bradley Graham, *Off-the-Shelf Defense Policy*, Wash. Post, May 8, 1996	5, 20
Meyer Scolnick & Joseph Packer, Evolution of the Army and Air Force Exchange Service, JAG L. Rev. Sept-Oct 1966	3, 4
DoD Active Duty Military Personnel Strengthens by Regional Area and by Country (309A), Sept. 30, 1997	13
DoD Defense Commissary Agency, Facts about DeCA, hhtp://www.dtic.mil/deca/decafacts.html	2, 3
DoD Directive No. 1330.9	2, 4
AAFES Special Retail Programs EOP 40-11 (November, 1994)	17, 19

TABLE OF AUTHORITIES—Continued

	Page
AAFES Worldwide Locations, http://www.aafes.com/pa/corporate_profile.htm	2
AAFES, Corporate Profile, http://www.aafes.com/pa/corporate_profile.htm	3
Navy Resale Manual, Pub. No. 145, Jan. 1989	4
NEX-Navy Exchange Service Command, About Us, http://www.navy-nex.com/aboutus/history, html	2, 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners General Media Communications, Inc., et al., respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The split decision of the court of appeals (Pet. App. 1a-44a) is reported at 131 F.3d 273. The amended opinion of the district court (*id.* 45a-67a) is reported at 952 F. Supp. 1072. The court of appeals' orders denying rehearing and suggestion for rehearing en banc (*id.* 68a-69a), and granting a stay of mandate (*id.* 70a-71a) are not reported.

JURISDICTION

The court of appeals entered its judgment on November 21, 1997, and denied a timely filed petition for rehearing and suggestion for rehearing en banc on February 3, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 343 of the National Defense Authorization Act for Fiscal Year 1997, codified at 10 U.S.C. § 2489a, and the Department of Defense Directive-Type Memorandum implementing Section 343 are reproduced in the Pet. App. at 72a-78a.

STATEMENT

Background of the Military Exchange System. The Department of Defense ("DoD") operates an extensive retail system, both within the United States and abroad, serving active and retired military personnel and their dependents. The retail operations range in size from large facilities, such as military base exchanges (which can include shopping centers, malls, home & garden centers, and ware-

houses), to small facilities, such as troop stores and stores aboard ships. Decl. of Stephen Rozzetti ¶ 2 (J.A. 108).[1] The Army and Air Force Exchange Service (AAFES) operates about 10,500 facilities, located in 25 countries; the Navy Exchange Service Command (NEXCOM) operates 114 land-based exchanges in addition to ships' stores; the Marine Corps operates additional exchanges at its installations.[2]

Exchanges exist to provide military personnel and their dependents with access to a variety of "articles and services necessary for their health, comfort, and convenience." DoD Directive No. 1330.9 at 1 (J.A. 114). The system is designed to ensure that military personnel—no matter where located—have a "convenient" place to purchase all the types of materials and services that would be available to the general public. The "Post Exchange System is the substitute for the multitude of shopping locations the average American takes for granted everyday." Decl. of Paul Bucha (J.A. 498). For service members stationed in certain locations abroad and on board some ships, exchanges may be the only place they can obtain American-made materials.

Although exchanges offer military personnel substantial cost savings, material provided through the exchange sys-

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[1] J.A. refers to the Joint Appendix in the Second Circuit. Generally, these retail outlets are separated into "commissaries" and "exchanges." Commissaries essentially serve as grocery stores, and primarily sell uncooked food and household items, such as paper towels. Exchanges operate more like large department stores. They sell goods ranging from appliances to automotive supplies to toys and clothing, and may also sell prepared foods and alcohol. *See* DoD Defense Commissary Agency, Facts about DeCA, http://www.dtic.mil/deca/decafacts.html (visited Mar. 2, 1998). (All Internet citations refer to official government Websites.) Both types of facilities will be referred to as "exchanges."

[2] *See* AAFES Worldwide Locations, http://www.aafes.com/pa/corporate_profile.htm (visited Mar. 2, 1998); NEX-Navy Exchange Service Command, About Us, http://www.navy-nex.com/aboutus/history.html (visited Mar. 2, 1998).

tem is *not subsidized* by the federal government. *See* J.A. 35, 38, 42, 45. Rather, the government generally negotiates to obtain materials at low wholesale rates and then sells to military personnel at retail prices lower than those charged outside the exchange system. *See id.*, J.A. 51. The savings is a non-cash form of indirect pay; exchanges are provided to military personnel in lieu of higher salaries and pensions.[3] The government utilizes the profits generated by exchange sales to finance the exchange system and to fund services and activities for the morale, welfare, and recreation of military personnel, such as libraries, chapels, and child care. Facts About DeCA, *supra* n.1.[4]

DoD maintains exchanges as "incentives to enlistment and reenlistment, helping to maintain morale by (1) making family living expenses more manageable, and (2) by providing familiar products for sale at overseas locations. By encouraging reenlistment, [exchanges] also help maintain acceptable manpower levels of trained, skilled personnel, which reduces the need to train new personnel." *Id.* The military branches describe the "mission, goal, and driving force" of exchanges they run as improving the quality of life for military personnel. *E.g.*, Navy Exchange Service Command, *supra* n.2. Surveys of service members consistently place the exchange system at the top of their most valued non-pay compensations. Facts about DeCA, *supra* n.1.

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[3] DoD estimates that customers save an average of 29.7 percent at commissaries and approximately 20 percent at exchanges. Facts About DeCA, *supra* n.1.

[4] Exchanges are almost 100% self-funded, requiring little, if any, congressionally appropriated money. *See* Meyer Scolnick & Joseph Packer, Evolution of the Army and Air Force Exchange Service, JAG L. Rev. Sept-Oct 1966 at 19 (J.A. 345); AAFES, Corporate Profile, http://www.aafes.com/pa/Corporate_Profile.htm (visited Mar. 2, 1998) (2% of budget is appropriated funds); NEX-Navy Exchange Service Command, *supra*, n.2 (only ships' stores use appropriated funds).

Military exchanges have always served a communicative function. At their inception, in the late 1800's, exchanges were located whenever practicable in the same buildings as the library or reading room. Scolnick and Packer, *supra* n.4 at 27 (J.A. 353). One primary mission of the early exchanges was the provision of "newspapers and magazines" to military personnel. *Id.* at 24, 25 (J.A. 350, 351). This communicative function has continued to this day. Listed among the products exchanges are authorized to provide are "books, manuals, and periodicals." DoD Directive No. 1330.9 at 2-1-3 (J.A. 135). Exchanges thus function, in significant part, as bookstores or newsstands.

Consistent with their mission to be "the primary source of nonsubsistence resale merchandise and services for military personnel on DoD installations," *id.* at 1 (J.A. 114), exchanges have traditionally sold and rented a broad cross-section of privately published expressive material, and have eschewed content-based and viewpoint-based discrimination and moralizing as a basis for selecting the materials offered. Publishers wishing to disseminate information through exchanges are permitted to do so, and military personnel and their families are therefore able to receive such information, as long as certain neutral criteria are met, including demand—both current and measured by past sales—and available shelf space. *See, e.g.,* Navy Resale Manual, Pub. No. 145, Jan. 1989, at 4-16 (J.A. 204).

Applying these neutral criteria, the standards governing exchange resale practices expressly recognize that exchanges will be offering "adult literature, music and video recordings." *Id.* Periodicals such as *Penthouse* and *Playboy* have been available through the exchanges for as long as they have been popular national magazines. Demand for the magazines is high. AAFES has reported that its exchanges sell 12.6 million copies of 219 different "adult" magazines every year out of a total of 57 million maga-

zines of all kinds.[5] In 1995, for example, approximately 220,600 copies of *Penthouse* were sold at military exchanges located in the United States, and another 47,000 copies were sold at exchanges and ships' stores abroad. Aff. of Joseph M. Gallo ¶ 4 (J.A. 42); *see also* Pet. App. 49a & n.4 (*Playboy* sales). Sales of "adult" materials generate considerable profit for the government. It is estimated that in 1995 the exchange system made approximately $459,000 on sales of *Penthouse* alone. Gallo Aff. ¶ 5 (J.A. 42). These profits fund quality-of-life programs for military personnel and their families.

Background of the Act. In early 1996, three Congressmen—Representatives Robert Dornan (R-Cal.), Christopher Smith (R-N.J.) and Roscoe Bartlett (R-Md.)—introduced a bill, which they called the Military Honor and Decency Act, that would ban the distribution of "adult" material in military exchanges. The bill was eventually enacted, without any title, as Section 343 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. No. 104-201, 110 Stat. 2422) (codified at 10 U.S.C. § 2489a) (the "Act"). No hearings were held regarding the Act, and no committee reports were issued.

DoD played no part in the drafting or enactment of the Act. DoD did not request or support the Act. Indeed, when DoD's opinion regarding such a ban had been sought in the past, it stated that such a ban "would raise serious constitutional and administrative problems."[6] The military did *not* contend that the Act was necessary to support the military's ability to carry out its mission, or to maintain loyalty, discipline, or morale in the armed forces. In fact, there is no evidence in the legislative history or

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[5] Guy Gugliotta and Bradley Grahm, *Off-the-Shelf Defense Policy*, Wash. Post, May 8, 1996, at A3.

[6] Memorandum for Director, Personnel Administration and Services, Office of the Ass't Secy. of Defense, from H. Lawrence Garrett, III (Gen. Counsel of the DoD), re: "Adult-Oriented" Magazines in Military Exchanges, dated Sept. 18, 1996, reprinted in Supplemental Appendix ("S.A.") submitted in the Second Circuit, at 5-7.

elsewhere that the Act was enacted in response to any military concern or problem.

Although the Act contains no express purpose, its sponsors made clear their intent. Congressman Dornan stated:

> This garbage, this direct assault on my mother, who has long gone to heaven, my wife who is very much alive, my sisters-in-law, my aunt who is alive in her 90's and my three daughters and five granddaughters and maybe a sixth granddaughter on the way.
>
> Pornography is a frontal, direct, vicious, specific assault upon women. It treats them—well, some homosexual pornography is a direct assault upon boys or young men or ephebes—young men 18, 19, 20—just barely over the age in most States of maturity. Most pornography is a direct assault on women, cheapening [them] down like slavery to a product, meat on a rack.
>
> [M]acho guys . . . think demeaning women by buying this garbage is manly, and it is not. . . . Some [exchange] managers with guts, practicing Protestants and Christians and observant Jews who work in the PX system saying, Hey, this is enough. . . . I want to junk it anyway. . . . That helps commanders to take that, not puritanical, but strong, manly decent line.

142 Cong. Rec. H8822, H8824 (July 30, 1996). This sentiment was echoed by other sponsors. *E.g.*, Robert Cohen, *New Military Enemy: Hustler and Playboy Amendment Can Ban Sales on U.S. Bases*, Star-Ledger, May 2, 1996, at 3 (quoting Rep. Bartlett during markup as stating "This is smut. This is demeaning to women and it leads to aberrant behavior."). Because DoD's views were not solicited and there were no hearings, the sponsors also mistakenly believed the government *subsidizes* materials offered through exchanges, and that banning adult materials was necessary to stop their subsidization. *See* Bartlett Press Release, May 1, 1996; Bartlett Press Release, Sept. 18, 1996 (S.A. 3). Nowhere in the sponsor's com-

ments was there any indication that they viewed the Act as necessary to or supportive of the military function.

The Act and Its Operation. The Act contains two independent statutory prohibitions, neither of which was requested or supported by the military. The first bans "the sale or rental of sexually explicit material on [DoD] property" (10 U.S.C. § 2489a(a)); the second forbids "[a] member of the armed forces or a civilian officer or employee of the [DoD] acting in an official capacity" to "provide for sale, remuneration, or rental sexually explicit material to another person" (10 U.S.C. § 2489a(b)). *See* Pet. App. 72a.

The Act defines affected DoD property to include commissaries, military exchanges, and ships' stores. *See* 10 U.S.C. § 2489a(d)(2); Pet. App. 72a-73a. Sexually explicit material is defined as meaning *only* "an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d)(1). *See* Pet. App. 72a. On the eve of the Act's effective date, DoD issued a "Directive-Type Memorandum" implementing the Act. It defined "dominant theme" as "[a] theme of any material that is superior in power, influence, and importance to all other themes in the material combined," and "lascivious" as "[l]ewd and intended or designed to elicit a sexual response." Pet. App. 76a.[7]

By its terms, the Act does *not* ban books, computer programs, or periodicals without visual depictions, regard-

[7] It is far from clear precisely what is banned. Unlike other laws, the Act does not require lascivious exhibition of the genitals. It merely requires lascivious descriptions or depictions of "nudity," and nudity is not defined. What it means to depict or describe *nudity* in a lascivious manner is not self-evident. Apparently, a photo or written description of a bare-breasted woman would be sufficient to trigger the ban if the depiction or description was deemed to be lewd and designed to elicit a sexual response.

less of their content. Consequently, a book containing lascivious descriptions (or depictions) of nudity is not banned, but an audio recording of the very same book is banned. Similarly, a periodical containing lascivious descriptions of nudity, but no visual images, is not banned; but the addition of visual depictions—even if not sexually oriented—results in banning the same periodical. Although "periodicals" can be banned, a one-time or special issue publication is not banned, even if it contains nothing but lascivious descriptions or depictions of nudity. Moreover, a periodical containing lascivious depictions of nudity will not be banned if those depictions are not the "dominant theme" of the periodical. Thus, the Act does not, by any means, ban all materials containing depictions or descriptions of "nudity . . . in a lascivious way." Finally, the Act does not ban the possession or non-commercial distribution on military property of lascivious descriptions or depictions of nudity, or of any other non-obscene sexually explicit material. Military personnel are permitted to purchase those materials off-base and to bring them on military property, or to obtain them through the mail.

The DoD Directive mandates the establishment of a "Resale Activities Board of Review," whose responsibility entails reviewing material offered or to be offered for sale or rental through exchanges and determining whether the material is banned under the Act. Pet. App. 77a. Once it is determined that the Act bans certain material, the material is withdrawn from all exchanges and cannot be purchased absent subsequent permission by the Board. *Id.* As applied to periodicals, this process will necessarily result in banning *future* issues based on the Board's judgment regarding the content of earlier issues.

Proceedings Below. Before the Act became effective, petitioners (publishers and distributors of materials at risk of being banned, *see* Pet. App. 6a), brought a facial challenge, alleging that the Act violates the First and Fifth Amendments. After petitioners filed a motion for prelimi-

nary injunction, the district court issued a temporary restraining order enjoining enforcement of the Act until the motion was resolved. After oral argument, the parties agreed to treat the motion as one for permanent injunction. *See id.*

The district court permanently enjoined enforcement of the Act, concluding that it violated both the First and Fifth Amendments. Without reaching the issue whether military exchanges are public or nonpublic fora, the court concluded that the Act violates the First Amendment on the ground that it bans protected speech because the government "finds the ideas, messages or perspectives expressed therein to be offensive, vulgar or indecent." Pet. App. 61a. The court rejected the government's post-hoc argument, advanced during litigation and supported by nothing in the statutory text or legislative history, that Congress intended the Act to promote military "core values" and to prevent public perception that the military endorses the material sold. The court noted, first, that the Act does not prohibit the possession or non-commercial distribution of sexually explicit material on military property, and there was no evidence that sale (versus possession) causes the alleged harm to the military's core values. *Id.* 60a. The court also observed that it was unreasonable to equate the sale or rental of sexually explicit material in exchanges with official "endorsement," as exchanges offer all kinds of harmful products that are popularly demanded by military personnel, such as alcohol and tobacco. *Id.* Rather, the court concluded, "a plain reading of the Act leads inevitably to the conclusion that it was drafted in an attempt to limit the sale and rental of non-obscene speech that Congress believed to be offensive and to penalize those who publish it by preventing its sale to military exchanges." *Id.*

The district court also held that the Act violates the equal protection component of the Fifth Amendment. The court concluded that "[b]y treating one form of publishing ideas differently than another, the Act invites strict

scrutiny," and found no evidence to suggest that this distinction was necessary to achieve the alleged goal of promoting "core values." *Id.* 63a-64a. Finally, the court held the Act void for vagueness because the subjective term "lascivious" invites *ad hoc* decisions that will inevitably chill protected speech. *Id.* 64a-67a.

A divided panel of the Second Circuit reversed. The majority concluded that the Act does not violate the First Amendment because military exchanges are nonpublic fora, the Act is not viewpoint-based, and the Act is reasonable in light of the purpose of the forum. The majority's forum analysis was grounded in its conclusion that military *bases* are created to prepare military personnel for combat, and "[t]he exchanges themselves are in no way *public*," *id.* 12a; further, the government is merely acting as proprietor. *Id.* The majority recognized that, even in a nonpublic forum, the government cannot restrict expressive activity based on the viewpoints expressed. *Id.* 13a. But the majority ruled that the Act's ban on material containing nudity presented in a "lascivious manner" did not constitute viewpoint-based discrimination. *Id.* 17a. Further, relying solely on the government's post-hoc justifications for law, and being "far more deferential" than when reviewing regulations impinging the First Amendment rights of civilians, *id.*, the majority concluded that the Act's ban is reasonable because it "promotes military honor, professionalism, proper decorum, and military 'core values,'" *id.* 20a, by "distancing the military from a perceived endorsement of these materials." *Id.* 22a.

Subjecting the Act's distinctions between different forms of expression only to rational basis analysis, and citing no evidence whatsoever, the majority opined that "Congress could rationally have concluded that exchanges do not trade extensively in books containing sexually explicit material . . . [and] that visual forms of lascivious expression are more prevalent, more likely to be noticed, or more

provocative than written materials." Pet. App. 23a.[8] The majority also concluded that the Act afforded sufficient clarity, because it is not a criminal statute and because greater vagueness should be tolerated in the military context. *Id* 24a-27a.

Judge Parker, in dissent, did not reach the forum issue because he would have held that the Act constitutes impermissible viewpoint discrimination. By banning only depictions of nudity that are "lascivious," Judge Parker concluded, "the government is necessarily attempting to regulate a specific perspective"—namely, "that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination." *Id.* 33a. Judge Parker explained, "[b]y restricting the sale of depictions which some viewers find offensive and others titillating, the government favors and protects the viewpoint of those offended and restrict[s] the viewpoint of those who are titillated." *Id.* 34a. Judge Parker concluded that the Act could not even satisfy intermediate First Amendment scrutiny, refusing to accept the government's "unsubstantiated post-hoc rationalization" (*id.* 40a): not only is there "no evidence that th[e] 'risk' of perceived official endorsement is real, it defies common sense." *Id.* 42a.

After denying a timely petition for rehearing and suggestion for rehearing *en banc*, Pet. App. 68a-69a, the court of appeals stayed issuance of its mandate. *Id.* 70a-72a.

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[8] The majority offered no rationale for why an audio recording of a book could be banned while the printed version was not; or why lascivious descriptions of nudity in a periodical with non-sexual visual images are banned while the same periodical with no images is not; or why a one-time publication, no matter how lascivious its content, would not be banned.

REASONS FOR GRANTING THE PETITION

The Court's review this Term of the decisions in *Arkansas Educ. Tel. Comm'n v. Forbes*, No. 96-779, and *National Endowment for the Arts v. Finley*, No. 97-371, demonstrates the importance of the public forum and viewpoint issues presented here. The decision below conflicts with this Court's precedents and with rulings of other courts of appeals. It also reflects continuing confusion regarding what constitutes a designated public forum, and what constitutes viewpoint-based discrimination, and this case presents a good vehicle for resolving that confusion. Moreover, the majority's decision is flatly wrong, and will result in massive restriction of the First Amendment rights of our country's military personnel and their dependents.

I. THE TEST APPLIED BY THE COURT OF APPEALS FOR DETERMINING WHETHER GOVERNMENT PROPERTY IS A DESIGNATED PUBLIC FORUM CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH THE TEST APPLIED IN OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED.

Like so many important First Amendment cases, this case arises in the context of an attempt by the government to regulate sexually oriented speech. But this case is not merely about such speech. It raises the fundamental question whether the government may restrict military personnel's access to speech of *any* content. The rule adopted by the court of appeals allows such content-based bans. The court found that any military property is a nonpublic forum, unless the military has "abandoned" the property to the general public. Thus, the court found, the military could preclude service members' access, through the exchange system, to constitutionally protected material, so long as the restriction is merely reasonable and the government can articulate a legitimate concern. The court's conclusion—that Congress' alleged desire not to have the military be "associated" with a particular type of speech is a legitimate ground for banning the sale of that speech

—is not limited to sexually oriented expression. Under the court's reasoning, the government would be free to restrict service members' access to, for example, information regarding race, abortion, or AIDS.

The impact of the decision below will be wide-ranging and severe. There are roughly 1.4 million active duty members of the armed services.[9] They and their dependents rely on exchanges to provide them with "convenient" and inexpensive access to expressive materials. Indeed, for the ten percent of active duty personnel stationed on board ships or submarines, and the sixteen percent stationed abroad from Antarctica to Zimbabwe, exchanges may represent the *only* source of English language expressive materials.[10]

This case thus fundamentally differs from those cases holding that members of the general public typically cannot gain access to military bases in order to distribute leaflets or make speeches, *e.g., Greer v. Spock*, 424 U.S. 828 (1976), and those cases upholding the proscription of speech that presents a clear danger to military loyalty, discipline, or morale. *See Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974). The majority below upheld a ban on speech from areas *specifically set aside for the dissemination of speech—exchange newsstands and bookstores*—simply because Congress was offended by that speech. In upholding this ban, the majority ignored this Court's precedent and lower court decisions applying that precedent.

In a series of cases, this Court has set out the test for determining whether government facilities are public fora. Such facilities may be public fora by tradition (such as public parks and streets) or by designation. The latter category is at issue here. A "designated" public forum is

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[9] *See* DoD, Active Duty Military Personnel Strengths by Regional Area and by Country (309A), September 30, 1997 (prepared by: Washington Headquarters Services Directorate for Information Operations and Reports).

[10] *See* DoD 309A Report, *supra* n.9; Bucha Aff. (J.A. 497).

property the "State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). Examples of designated public fora are university meeting facilities, *Widmar v. Vincent*, 454 U.S. 263 (1981); school board meetings, *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); municipal theaters, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); and a candidates' debate for a particular Congressional seat, sponsored by and broadcast on public television, *Forbes v. Arkansas Educ. Tel. Comm'n*, 93 F.3d 497 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997). Both "traditional" and "designated" public fora are subject to stringent First Amendment constraints. In either type of forum, the government may *not* impose "content-based" restrictions on expressive activity unless it can demonstrate a "compelling state interest . . . that is narrowly drawn [to achieve that end]." *Perry Educ. Ass'n*, 460 U.S. at 45.

In determining whether a designated public forum has been created, courts must first define the relevant property. In doing so, the focus must be on "the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). Thus, if a speaker sought general access to the entirety of particular government property, the inquiry would focus on the property as a whole. If, however, a speaker seeks access to only a portion of the property, the inquiry must focus on that portion. *Id.* Courts must then consider whether government intended to open *that portion* of its property to expressive activities. *See id.* at 802; *Perry*, 460 U.S. at 45-46. The government's assertions regarding its intent are not, however, accepted blindly. Instead, courts look first "to the policy and practice of the government" with respect to the underlying property, and then "examine[] the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. This inquiry is required to guard "against the dangers of post-hoc policy formulation. . . . The government may not 'create'

a policy to implement its newly-discovered desire to suppress a particular message." *Air Line Pilots Ass'n Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1153 (7th Cir. 1995).

The court below generally acknowledged these tests, but did not apply them. In this case, speakers and listeners sought to distribute and receive expressive material only through *exchanges*. Thus, the court was required to examine exchanges alone—those portions of military property that offer access to magazines, newspapers, and books. *See Flower v. United States*, 407 U.S. 197 (1972) (road running through military base is a public forum, although the base itself is not); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985) (cable television access to military bases may be designated public fora, even though bases themselves are not); *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (chapels on military bases are public fora, even though base itself is not).[11] Ignoring those rulings of this Court and other courts, the court below focused not on exchanges but on the military's practices with regard to entire *bases*, and relied on cases holding that bases themselves are not public fora. Pet. App. 10a (*citing Greer v. Spock, supra*; *United States v. Albertini*, 472 U.S. 675 (1985)). It emphasized that it is "the business of a military installation . . . to train soldiers, not provide a public forum." *Id.* 10a (internal quotation omitted). This conclusion is simply beside the point.

The court of appeals also rested its decision in large part on the misapprehension that military bases (or portions thereof) cannot be designated public fora unless they have been "abandoned." Pet. App. 13a. No other

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[11] *See also Forbes*, 93 F.3d at 503 (where plaintiff sought access to candidates' debate, relevant forum is such debate, not television channel's entire programming); *Airline Pilots Ass'n*, 45 F.3d at 1151-1152 (where plaintiff sought access to advertising display cases in airline terminal, relevant forum was display cases, not entire terminal).

court has held that portions of a military base cannot be designated public fora unless the government has "abandoned" all claims to exclude civilians. Although abandonment is one way to establish that a public forum has been created, *see Flower v. United States, supra*, there is no "special test for military bases. . . . In all cases, whether military bases are involved or not, the test is simply whether the government intended to open up the facility . . . ." *Brown v. Palmer*, 944 F.2d 732, 739 (10th Cir. 1991); *see also Rigdon, supra* (finding that chapels on military bases are designated public fora, even though the government had not abandoned all claims to exclude civilians from those chapels).

The court's "abandonment" test led it to rely, erroneously, on the fact that "exchanges themselves are in no way *public*." Pet. App. 12a. Instead, the court emphasized, only "military personnel, their dependents, orphans, surviving spouses, and certain other affiliated personnel" have access to exchanges. *Id.* These limitations, the court found, serve as an "indicator that the government did not intend to dedicate exchanges to expression and discourse," because "a limited audience would necessarily hinder, rather than further, the opportunities for communication by speakers such as [petitioners]." *Id.*

That analysis is flatly at odds with this Court's holdings that a designated public forum need not be opened to the public at large, or for all expressive activity, but may be created for use by a particular group, or for a particular purpose. *See, e.g. Widmar v. Vincent, supra* (student groups); *City of Madison Joint Sch. Dist., supra* (school board business).[12] In *Widmar*, as here, government facilities were not opened for use by the public at large. None-

[12] Some courts have classified public fora designated for specific uses as "limited public fora," a subcategory of designated public fora. *See, e.g., Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688 (2d Cir. 1991) (school auditorium is "at least" a limited public forum); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (public library is a limited public forum for the purpose of access to information).

theless, this Court held that "[t]hrough its policy of accommodating their meetings, the University has created a forum," albeit a forum designated for use by students only. *Widmar*, 454 U.S. at 268. The court below failed to apply this principle. Had it done so, it would have been forced to conclude that through its policy of opening exchanges for expressive activities, the government created a public forum, albeit a forum designated for use by military personnel and their dependents only.

The court also relied on the irrelevant fact that because of physical space limitations, not all speakers who wish to speak through exchanges can be accommodated. Pet. App. 12a. But as this Court's precedents make clear, the use of neutral criteria to decide who can speak is perfectly consistent with the concept of a designated public forum. The question is not whether the government property is open to *all* speakers, but whether it has been opened to any speakers who satisfy neutral criteria. *See Widmer, supra*; *Madison Joint Sch. Dist., supra.* Here, the evidence submitted by the government itself demonstrated that military exchanges have historically been open to all lawful speech that satisfies neutral criteria such as customer demand and available shelf space. *See, e.g.*, AAFES Special Retail Programs EOP 40-11, 10-2(a) (November, 1994) (J.A. 164) (directing that decisions be made based on customer demand, shelf space, and price); *see also* S.A. 5 (DoD memo, *supra* n.6, noting same). In holding there was no intent to create a designated public forum because not all books and magazines are carried in every exchange, the court below ignored this evidence, and failed to follow *Widmar* and its progeny.

Finally, the court ignored clear precedent when it held that "because military exchanges are 'engaged in commerce,' their operation is generally inconsistent with the creation of a public forum." Pet. App. 12a. As this Court has made clear, even when the government is acting as proprietor, the "restrictions that the government seeks to place on the use of its property" must be analyzed using a "forum based" approach. *See International Soc'y*

for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); *see also United States v. Kokinda*, 497 U.S. 720, 726 (1990) (noting that, since its decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), which employed a "proprietor" test, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes" (citation omitted)).[13]

Because the court of appeals misapplied this Court's test for determining whether government property is a designated public forum, and thus erroneously concluded that military exchanges are not, it did not subject the Act to the strict scrutiny designated public fora require. *See Perry*, 460 U.S. at 46. Had it done so, the Act would have been struck down; the government did not even attempt to argue that the content-based ban satisfies strict scrutiny.

Ironically, finding that exchanges are not designated public fora *creates* the "endorsement" problem the government purports to be concerned about. The Act's content-based ban of some but not all sexually explicit material will necessarily give rise to the inference that the government *does* endorse the sexually explicit material it has not banned. By contrast, if exchanges are properly recognized to be designated public fora, the government could not be perceived as endorsing any given material, because speech in such a forum is *public* speech, not government speech. DoD could easily post notices reflecting the position announced in its regulations that it "does not

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[13] In any event, although the military may be acting as a proprietor, the military did not adopt the ban at issue in this case. Congress did, and it did so not in its role as proprietor, but in its role as lawmaker—dictating what is appropriate for military stores to carry based on the content, and purported viewpoint, of the material sold. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (distinguishing between the government acting as proprietor and as lawmaker).

have the right to remove adult-oriented reading material from sale unless the materials have been judged to be obscene by a state or federal court." AAFES Special Retail Programs EOP, at 10-2(e)(1) (J.A. 165); *see also* Pet. App. 42a (Parker, J., dissenting) (DoD could post "non-endorsement" signs). If exchanges are held to be designated public fora, military consumers will recognize that all constitutionally protected information for which there is demand is made available in exchanges, regardless of whether the military approves of any given publication's content.

II. THE TEST APPLIED BY THE COURT OF APPEALS FOR DETERMINING WHETHER A REGULATION OF SPEECH IS VIEWPOINT-BASED CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH THE TEST APPLIED IN OTHER COURTS OF APPEALS, AND IS FUNDAMENTALLY FLAWED.

This case requires review for a second reason. By holding that the ban on petitioners' speech was not viewpoint-based, and was therefore permissible, the majority ignored this Court's precedents and created irreconcilable tension with the correct decisions of several other Circuits. Even in a nonpublic forum the government may not permit some speech and exclude other speech of the same type based on viewpoint. *See Cornelius,* 473 U.S. at 811; *see also Perry,* 460 U.S. at 46. In the Act, Congress discriminated based on viewpoint in two ways: it deliberately sought to advance its own viewpoint by suppressing what it perceived as petitioners' contrary viewpoint; and it suppressed petitioners' actual viewpoint on a range of subject matter including sexuality, gender roles, and morality.

Animus against petitioners and similarly situated speakers motivated the Act. Congress did not ban all depictions of nudity; rather, it banned only certain forms of expression that "depict[] or describe[] nudity . . . in a lascivious way." 10 U.S.C. § 2489a(d)(1). The Act permits any depiction of nudity that is deemed chaste, artistic, or scientific, and therefore not "demeaning." This distinc-

tion reflects Congress' clear intent, borne out by the legislative history, to impose its own view of morality on service members and their dependents.

Every justification offered for the Act in Congress and in this litigation entails viewpoint discrimination. In a floor speech, Rep. Dornan, the principal sponsor, said his bill should be enacted to promote "decent" speech, because "[p]ornography is a frontal, direct, vicious specific assault upon women . . . cheapening [them] down like slavery to a product, meat on a rack." 142 Cong. Rec. H8822, H8824 (July 30, 1996). The bill's sponsors openly sought to suppress what they saw as the undesirable viewpoints of periodical publishers that include nude images in their publications, expressly naming *Penthouse* and *Playboy*. *Id.* The sponsors characterized magazines that publish nude photographs as "garbage," *id.* (Rep. Dornan), and "demeaning to women," Gugliotta & Grahm, *supra* n.5, at 3 (quoting Rep. Bartlett during markup of bill). The majority simply dismissed these expressions of congressional intent. *See* Pet. App. 19a n.13.

In defending the Act, government counsel advanced, and the majority approved, two different but equally viewpoint-based rationales—that the Act was necessary to "promote[] military honor, professionalism, proper decorum, and military 'core values,' " *id.* 20a, and "to disassociat[e] the military from [petitioners'] speech," *id.* 15a n.10, in order to avoid "sending a message that military approves of or endorses" that speech. *Id.* 19a. Accordingly, the court approved a scheme whereby a nude image is proscribable only if it expresses a viewpoint that, in Congress' eyes, offends military "core values" or threatens to taint the military by association.

Even apart from the absence of *any* evidence that the *military* thought the Act was necessary or helpful to promote "core values," a regulation designed to promote core values is necessarily viewpoint-based, and thus unconstitutional. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can pre-

scribe what shall be orthodox in . . . matters of opinion. . . ." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The government may have some latitude to promote values to military personnel, a lesser corollary of the latitude public schools have to "transmit community values" to their students. *Cf. Board of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion).[14] Neither institution, however, may promote its preferred values by squelching viewpoints it deems inconsistent with those values. As *Pico* noted, if respondents "intended by their removal decision to deny . . . access to ideas with which [respondents] disagreed, and if this intent was the decisive factor in [respondents'] decision, then [respondents] have exercised their discretion in violation of the Constitution." *Id.* at 871 (footnote omitted); *see also Barnette*, 319 U.S. at 637; *cf. Texas v. Johnson*, 491 U.S. 397, 418 (1989) ("To say that the government has an interest in encouraging proper treatment of the flag . . . is not to say that it may criminally punish a person for burning a flag as a means of political protest."). Banning descriptions and depictions perceived as "demeaning" to women, or as inconsistent with "core values," plainly violates this prohibition. *See American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (striking down ordinance banning sexually oriented material depicting women in "subordinate" manner); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986) (Library

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[14] The majority below relied on *Pico*, 457 U.S. at 871, and on *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), for its fallacious conclusion that "a distinction based on lasciviousness is viewpoint neutral." Pet. App. 16a-17a. That reliance was misplaced. *Pico* presented no issue of viewpoint discrimination on grounds of "lasciviousness," and the speaker in *Fraser* appears not to have argued viewpoint discrimination at all. In addition, both *Pico* and *Fraser* involved primary public schoolchildren, a population that presents very different problems and involves very different governmental interests than do the soldiers and sailors at issue here. *See Fraser*, 478 U.S. at 682-83 (distinguishing adults' expressive rights from children's lesser rights).

of Congress' ban of braille edition of *Playboy* is unconstitutional viewpoint-based discrimination); *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (government could not "prohibit only that commercial advertising that depicts men in a demeaning fashion").[15]

The majority failed even to examine the government's manufactured post-hoc "core values" and "endorsement" rationales in assessing whether the Act discriminated based on viewpoint. This Court has made clear that reviewing courts must critically examine the justifications governments offer for arguably viewpoint-based restrictions on speech. Indeed, the asserted justifications for challenged laws frequently have been cited as the best evidence of their discriminatory purposes. *See R.A.V.*, 505 U.S. at 393; *Texas v. Johnson*, 491 U.S. at 411; *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 688-89 (1959). As in those cases, the justifications offered in support of the Act confirm the impermissible discriminatory purpose behind it.

The narrow category of speakers penalized by the Act also confirms Congress' discriminatory animus. The Act carefully targets a specific segment of the print medium: only "a periodical with visual depictions" is barred from exchanges. 10 U.S.C. § 2489a(d)(1).[16] The effect of the

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[15] The majority below misread *R.A.V.* In *R.A.V.*, this Court stated in dicta that, within a class of *unprotected* speech, government could discriminate based on the same characteristics that caused the speech to be unprotected. *See* 505 U.S. at 388. Because this Court's example of that principle was discrimination based on "prurience" within the class of obscenity, *see id.*, the majority below concluded that, even as to *protected* speech, "prurience and patent offensiveness are . . . permissible grounds on which to discriminate." Pet. App. 16a. The Court's extension of the *R.A.V.* dictum to protected speech cannot withstand scrutiny.

[16] For example, Madonna's book *Sex*, which contains numerous nude images and would undoubtedly be deemed "lascivious" if printed in a periodical, can be sold at exchanges, as can Henry Miller's *Tropic of Cancer*.

Act's precisely crafted proscription is to single out the small class of publishers who sell "periodical" publications which contain nude images. In fact, the Act's sponsors singled out some of those publications by name. *See supra* p. 20.

This Court has inferred discriminatory animus from similar attacks on narrow segments of the print media. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), Louisiana applied a special tax to publications that accepted advertising and had a weekly circulation of more than 20,000 copies, thereby burdening only a small group of publishers. *Id.* at 240-241. In striking down the tax, this Court emphasized that the narrow range of speakers affected strongly implied a discriminatory intent. The tax was "measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a *selected group* of newspapers." *Id.* at 251 (emphasis added). *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), held that discriminatory taxation of a small segment of the print media violated the First Amendment even absent discriminatory animus, *see id.* at 591-92 (see also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-29 (1987)), but it left no doubt that disparate treatment burdening a selected group of publishers is strong evidence of discriminatory intent.

In this case, the narrow range of publishers affected by the Act reflects Congress' discriminatory animus. Congress would have served more effectively any of the constitutionally infirm justifications offered for the Act—banning material that "demeans" women, disassociating the military from potentially "offensive" material, or promoting military "core values"—by casting the Act's net to encompass printed matter beyond periodicals and content beyond "lascivious" depictions of "nudity." The Act's narrow compass confirms what the government's justifications for the Act establish: Congress' purpose in passing the

Act was to suppress ideas it did not like that were likely to be expressed by speakers it did not like. *See Arkansas Writers' Project*, 481 U.S. at 229-30.

Besides intentionally discriminating against a viewpoint Congress *imputed* to petitioners, the Act effectively discriminates against petitioners' *actual* viewpoint: the perspective on sexuality, gender roles, and morality expressed by petitioners and other speakers blacklisted by the Act. The court below characterized the Act as merely discriminating based on "content," not "viewpoint." But two recent decisions of this Court, and numerous appellate cases following those decisions, preclude that analysis.

Twice in recent Terms, this Court has held that the test for "viewpoint-based" discrimination must be broadly construed, in order to prevent the government from imposing a viewpoint-based regulation by mischaracterizing it as content-based. In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court overturned a school district ordinance that opened school property for numerous uses but not for religious purposes. The Court held that the district's refusal to allow screening of a religious film about family values amounted to a denial "solely because the film dealt with the subject from a religious standpoint." *Id.* at 394. This Court expanded on *Lamb's Chapel* in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), which involved a university's refusal to subsidize a Christian student publication called *Wide Awake* with funds available to other student publications. The University argued that, because it refused to subsidize any viewpoint on the "subject" of religion, its policy was permissible content discrimination. This Court rejected that argument. While acknowledging that "[r]eligion may be a vast area of inquiry," the Court explained that religion also provides "a specific premise, a perspective, a stand-point from which a variety of subjects may be discussed and considered." *Id.* at 831. The Court concluded that *Wide Awake*'s "prohibited perspective, not the general subject matter, resulted in" the discrimination. *Id.; see also Johnson*, 491 U.S. at 413 & n.9.

Petitioners here, like the speakers in *Lamb's Chapel* and *Rosenberger*, express a particular viewpoint on a variety of subjects, including human sexuality, gender roles, and morality. Magazines such as *Penthouse* deal with sexuality as healthy and enjoyable, and portray women and men as attractive individuals who enjoy their sexuality. They advocate and reflect a tolerant attitude toward sex and sexuality. The subjects on which petitioners express their perspective, no less than the "variety of subjects" at issue in *Rosenberger*, are categories within which government may not discriminate based on viewpoint. The Act, however, singles out petitioners' viewpoint for suppression while permitting contrary viewpoints on the same topics. Under the Act, service members and their families will remain free to purchase magazines like *Ms.*, which criticize notions of sexual freedom as exploitative of women; like *Good Housekeeping*, which perpetuate traditional gender roles; and like the *National Review*, which advocate a socially and morally conservative agenda, including a more restrictive view of the appropriate degree of sexual freedom for men and women. All of those publications, quite properly, will remain available in exchange bookstores and newsstands if enough service members and their families want to buy them. But *Penthouse* and other materials that depict or describe nudity in the course of expressing less traditional viewpoints on sexuality, gender roles, and morality will be banned.

The opinion below, by defining petitioners' perspective on a range of topics as mere "content," clears the way for almost unlimited approval of viewpoint-based censorship in the guise of "content selection." *Lamb's Chapel* and *Rosenberger* require exactly the opposite approach—a broad understanding of "[t]he prohibited perspective, [as opposed to] the general subject matter," *Rosenberger*, 515 U.S. at 831—as a means to prevent viewpoint discrimination. The majority's failure to follow this Court's decisions will deny the First Amendment's expressive liberty to the very people charged with defending it.

The court of appeals' acquiescence in the Act's viewpoint discrimination conflicts sharply with recent decisions of at least six other Circuits. The Ninth Circuit confronted, and this Court is considering a claim very similar to petitioners' in *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997). In *Finley*, several artists challenged a statute that required the NEA, in weighing grant applications, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954 (d)(1); *see* 100 F.3d at 674-75. The appellate court held the case indistinguishable from *Rosenberger*:

> Here, too, it is the treatment of a subject, not the subject itself, that is disfavored. Two depictions of the same subject matter—an American flag, for example—could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public," and the other did not.

100 F.3d at 683. Thus, the *Finley* court understood *Rosenberger* to require treating "indecency" and attitudes toward "beliefs and values" as imputed viewpoints, rather than mere subject matter. If the Ninth Circuit was correct, then that dictate of *Rosenberger* also must encompass expressive material "the dominant theme of which depicts or describes nudity . . . in a lascivious way," 10 U.S.C. § 2489a(d)(1), or does not take a "decent line." *Supra*, p. 6.

Indeed, two Circuits have applied this Court's recent decisions to bar discrimination between clashing viewpoints about sexuality and morality. In *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) ("*GLBA*"), a state forbade state universities from funding any organization that "fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws." Ala. Code § 16-1-28; *see GLBA*, 110 F.3d at 1545. A student organization, denied funding under

the statute, challenged it, and the Eleventh Circuit held that the statute impermissibly discriminated against the organization's viewpoint on the subject of sodomy and sexual misconduct laws. Finding *Rosenberger* "directly on point," *GLBA*, 110 F.3d at 1550, the court explained that the University

> does not prohibit discussion of the sodomy or sexual misconduct laws in general. Rather . . . [t]he statute discriminates against one particular viewpoint because state funding of groups which foster or promote compliance with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination.

Id. at 1549. Similarly, in *AIDS Action Comm. v. MBTA*, 42 F.3d 1, 10-12 (1st Cir. 1994), the First Circuit struck down a policy that prohibited condom advertisements in subway cars while permitting R-rated film advertisements that "represent the *conventional* exploitation of women's bodies for commercial advertising," *id.* at 12, because the policy created "at least an appearance of viewpoint discrimination." *Id.* at 12. Both *GLBA* and *AIDS Action* found viewpoint discrimination in enactments that forbade unpopular, arguably indecent expression about sexuality and morality. Faced with an indistinguishable enactment in this case, the court below found only content discrimination.

Courts of appeals have applied *Rosenberger* and *Lamb's Chapel* in both nonreligious and religious contexts to distinguish viewpoint-based discrimination from content-based distinctions, in ways that cannot be squared with the decision below. *See, e.g., Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (*en banc*) (holding that University official's removal from a history department display of two photographs of professors with historic weapons and uniforms violated prohibition on viewpoint-based discrimination because the photos "expressed the plaintiffs' view that the study of history necessarily involves a study of military history, including the use of military weapons," and was not merely content-based);

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 584 (7th Cir. 1995), *cert. denied*, 117 S.Ct. 1822 (1997) (holding that municipal prohibition on the plaintiffs' display of a menorah in a public building during Chanukah discriminated against the plaintiffs' "viewpoint" on the "subject" of "the holiday season"); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (reinstating a viewpoint discrimination claim arising from a county's barring a religious monolith from a public lawn that already contained a similar privately erected structure); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278-79 (10th Cir.) (striking down as viewpoint-discriminatory a restriction on religious discussions and activities at city-run senior centers), *cert. denied*, 117 S.Ct. 360 (1996).

III. THE COURT OF APPEALS' ANALYSIS IN CONCLUDING THAT THE ACT IS REASONABLE IN LIGHT OF THE PURPOSE OF EXCHANGES CONFLICTS WITH THE ANALYSIS EMPLOYED BY OTHER COURTS OF APPEALS AND IS FUNDAMENTALLY FLAWED.

Even if the majority were correct that military exchanges are nonpublic fora, and that the Act is not viewpoint-based, its decision nonetheless conflicts with the reasoning of other Circuits and is clearly wrong, warranting this Court's review because of the importance of the First Amendment rights at stake. Content-based, non-viewpoint-based regulation of speech in a nonpublic forum is permissible only if it is "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806.[17] Contrary to the majority's approach, which simply deferred to the government's post-hoc arguments and sup-

[17] The Act is patently unreasonable in light of the purposes of military exchanges. Exchanges are expressly designed to duplicate stores available to the general public and to be the "primary source" of expressive materials and other goods military personnel request for their comfort and convenience, at reduced prices. *Supra* p. 2-4. The Act, however, makes it less convenient and more expensive to purchase certain constitutionally protected materials that service members have demonstrated they want to purchase.

positions, other Circuits have recognized that this test "requires more than does the traditional rational basis test." *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996); *Searcey v. Harris*, 888 F.2d 1314, 1321-22 (11th Cir. 1989) (requiring evidentiary support for reasonableness of government ban); *see also Cornelius*, 473 U.S. at 810-811 (discussing evidence supporting reasonableness of conclusions).

The majority concluded that the Act's ban "is a 'reasonable' means of promoting the government's legitimate interest in protecting the military's image and its core values." Pet. App. 21a-22a. To begin, the "irrationality of this unique and puzzling regulatory framework ensures that the . . . ban will fail to achieve that end." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 1592 (1995). In *Coors*, this Court considered the constitutionality of a federal ban on alcohol content on beer labels. The Court observed that the fact that the government permits such information in beer advertising, and requires it for wine and spirits labels, necessarily means that the ban will not further a purported interest in avoiding customers' purchasing beverages with the highest alcohol content. Moreover, the Court concluded, "these exceptions and inconsistencies bring into question the purpose of the . . . ban." 115 S. Ct. at 1593. The failure to extend the prohibition "makes no rational sense if the government's true aim is [as stated]." *Id.* at 1592. So too here. The failure to ban *all* lascivious depictions and descriptions of nudity will actually create (not eliminate) an appearance of endorsement. *See supra* p. 18. If Congress' true aim were to promote "core values" and prevent the military's association with the materials banned, why would it ban only a narrow subset of sexually oriented materials and *allow* the sale of significant amounts of such material? And why would Congress permit military personnel to obtain the banned materials from their commanders so long as they were not charged for it; would not such activity "lead a service member to conclude that such materials were sanctioned by superior officers"

(Pet. App. 19a)? And why, if such materials really undermined military professionalism, honor, and decency, would Congress permit military personnel to possess the same materials obtained off-base or through the mail?

Even if it were clear that avoiding "endorsement" was Congress' goal, it is totally illogical to conclude, as did the majority, that "official endorsement [is] *inherent* in the military's resale of the proscribed materials." Pet. App. 28a (emphasis added). As both the district court and Judge Parker noted, exchanges sell all kinds of products, including cigarettes, alcohol, and condoms, yet no argument could be made that the government "officially endorses" smoking, drinking or non-procreative sex. *See id.* 60a; 42a (Parker, J., dissenting). *Cf. Tucker*, 97 F.3d at 1215 ("[R]easonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-sponsored or endorsed."). Because decisions regarding what expressive materials are sold rest in large part on local demand, the military personnel themselves, not the exchanges, are "supporting" the products sold.[18] Pet. App. at 42a (Parker, J., dissenting).

Finally, Congress' " 'failure to select . . . simple available alternative[s] suggests' that the ban it has enacted is not reasonable." *Tucker*, 97 F.3d at 1216 (quoting *Multimedia Pub. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993)). One such alternative, suggested by Judge Parker—erecting non-endorsement signs—the majority refused to consider. *See* Pet. App. 42a. In that respect, as well, the majority's analysis of the reasonableness of the prohibition was inconsistent with the analysis employed by other Circuits.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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[18] DoD already takes steps to *regulate* the "adult" materials available through exchanges, by prohibiting their sale or rental to minors, placing them out of the reach of children, requiring covers, and prohibiting perusing. (J.A. 164-165).

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